

No. WD 61268

IN THE

MISSOURI COURT OF APPEALS, WESTERN DISTRICT

—
**STATE *ex rel.* FORD MOTOR COMPANY, THE BUDD COMPANY, AND
COOPER TIRE & RUBBER COMPANY,**

Relators,

v.

**THE HONORABLE JOHN R. O'MALLEY, JUDGE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,**

Respondent.

—
RESPONDENT'S BRIEF

—
THE HONORABLE JOHN R. O'MALLEY
Circuit Court of Jackson County,
Missouri, at Kansas City
415 E. 12th Street
Kansas City, MO 64106

Stephen M. Glassman
130 S. Bemiston Ave., Suite 700
St. Louis, MO 63105
T: 314/863-4654
F: 314/862-4357

RESPONDENT

Randy W. James
Lauren E. Perkins
RISJORD & JAMES, P.C.
218 NE Tudor Road
Lee's Summit, MO 64086
T: 816/554-1500
F: 816/554-1616

ATTORNEYS FOR PLAINTIFFS
DEWEY AND CONNIE JOHNSON
TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT.....	6
STATEMENT OF FACTS	7
POINTS RELIED ON.....	10
STANDARD OF REVIEW.....	12
ARGUMENT	13
1. Relators Are Not Entitled To An Order Prohibiting Respondent From Taking Any Further Action In The Underlying Case Other Than To Transfer It To A County Where Venue Is Proper Because The Decision of The Missouri Supreme Court in <i>State Ex Rel. Linthicum v. Calvin</i> Cannot Be Applied Retroactively To The Underlying Case.....	13
A. Relators Have Misinterpreted Missouri Law in Arguing That <i>Linthicum</i> Should Be Applied Retrospectively	13
B. Fundamental Fairness Requires That <i>Linthicum</i> Be Applied Prospectively	15
C. Relators=Forum Shopping Argument Is Flawed and Does Not Support Retrospective Application of <i>Linthicum</i>	21
II. Relators Are Not Entitled To An Order Prohibiting Respondent From Taking Any Further Action In The Underlying Case Other Than To Transfer It To A County Where Venue Is Proper Because Regardless of Its Prospective Versus Retroactive Application, <i>Linthicum</i> is Inapplicable to the Facts of the Underlying Case.....	22

III. Relators Are Not Entitled To An Order Prohibiting Respondent From Taking Any Further Action In The Underlying Case Other Than To Transfer It To A County Where Venue Is Proper Because Venue in Jackson County, Missouri, Was Proper Under Section 508.040 R.S.Mo. Against The Petitioning Defendants, All of Whom Were Named in Plaintiffs=Original Petition and Revival of That Petition Requires Denial of Defendants=	
Petition For Writ of Prohibition	23
CONCLUSION.....	25
APPENDIX.....	A-1

TABLE OF AUTHORITIES

CASES

<i>Anglim v. Missouri Pac. R. Co.</i> , 832 S.W.2d 298 (Mo. banc 1992).....	19
<i>Beatty v. State Tax Commission</i> , 912 S.W.2d 492 (Mo. banc 1995)	14
<i>Burns v. Laborer & Industrial Relations Commission</i> , 845 S.W.2d 553 (Mo. banc 1993).....	14
<i>Chevron Oil Company v. Huson</i> , 404 U.S. 97 (1971)	16
<i>Corvera Abatement Technologies Inc. v. Air Conservation Commission</i> , 973 S.W.2d 851 (Mo. banc 1998).....	14
<i>Deister v. Kansas City Northwestern Ry. Co.</i> , 195 S.W. 499 (Mo. 1917).....	11, 23
<i>Doe v. Roman Catholic Dioces of Jefferson City</i> , 862 S.W.2d 338 (Mo. banc 1993).....	14
<i>Fishman v. Joseph</i> , 14 S.W.3d 709 (Mo. Ct. App. 2000)	12
<i>Fults v. Board of Probation and Parole</i> , 857 S.W.2d 388 (Mo. App. W.D. 1993).....	14
<i>In Re: Franz=Estate</i> , 372 S.W.2d 885 (Mo. 1963)	23
<i>Linkletter v. Walker</i> , 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601(U.S. La. 1965)	16
<i>Magnuson v. Kelsey-Hayes Co.</i> , 844 S.W.2d 448 (Mo. App. W.D. 1992).....	19
<i>McGhee v. Dickson</i> , 973 S.W.2d 847 (Mo. banc 1998)	12

<i>Mendelsohn v. State Board of Registration</i> , 3 S.W.3d 783 (Mo. banc 2000)	14
<i>Missouri Pac. R. Co. v. Whitehead & Kales Co.</i> , 566 S.W.2d 466 (Mo. banc 1978).....	19
<i>Prayson v. Kansas City Power and Light Co.</i> ,	
847 S.W.2d 852 (Mo. App. W.D. 1992)	10, 15, 20
<i>State ex rel. Armstrong v. Mason</i> , No. SC82669 (Nov. 14, 2000)	8, 18, 19
<i>State ex rel. DePaul Health Ctr. v. Mummert</i> ,	
870 S.W.2d 820 (Mo. banc 1991).....	7, 10, 11, 17, 19, 24
<i>State ex rel. Johnson v. Griffin</i> , 945 S.W.2d 445 (Mo. banc 1997).....	17, 18
<i>State ex rel. Landstar Ranger, Inc. v. Dean</i> ,	
62 S.W. 3d 405 (Mo. banc 2001).....	10, 20, 22
<i>State ex rel. Linthicum v. Calvin</i> ,	
57 S.W.3d 855 (Mo. banc 2001).....	8, 10, 11, 13, 15, 16, 17, 18, 20, 21, 22, 24
<i>State ex rel. Miracle Recreation Equipment Co. v. O=Malley</i> ,	
62 S.W.3d 407 (Mo. banc 2001).....	11, 20, 22
<i>State v. Shafer</i> , 609 S.W.2d 153 (Mo. banc 1980).....	15
<i>Sumners v. Sumners</i> , 701 S.W.2d 720 (Mo. banc 1985).....	10, 15, 21
<i>Tyler v. Mitchell</i> , 853 S.W.2d 338 (Mo. App. W.D. 1993).....	14
<i>Welch v. Continental Placement, Inc.</i> ,	
627 S.W.2d 319 (Mo. Ct. App. W.D. 1982)	11, 23
<i>Wellner v. Director of Revenue</i> , 16 S.W.3d 352 (Mo. Ct. App. W.D. 2000)	14

STATUTES

MO. REV. STAT. Section 508.010 7, 17
MO. REV. STAT. Section 508.040 7, 8, 11, 23, 24

CONSTITUTION

Mo. Const. Article I, Section 13..... 14
Mo. Const. Article V, Section 46

JURISDICTIONAL STATEMENT

Respondent agrees with Relators that this Court has jurisdiction in this proceeding pursuant to the Missouri Constitution Article V, Section 4(1).

STATEMENT OF FACTS

On December 7, 1999, plaintiffs in the underlying action, Dewey and Connie Johnson, filed a petition in the Circuit Court of Jackson County, Missouri, naming only the relator/defendants herein, The Budd Company, Cooper Tire & Rubber Company and Ford Motor Company, all of which are corporations. *See*, Appendix A-2. Plaintiffs alleged that venue was proper in Jackson County based on the fact that, at all relevant times, both Cooper and Ford maintained an office or agent for the transaction of their usual and customary business in Jackson County. *Id.* Relators do not contest that venue in Jackson County as to them as the sole defendants in the case was proper under ' 508.040 R.S.Mo. which provides in relevant part,

Suits against corporations shall be commenced . . . in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.

Plaintiffs subsequently amended their Petition to add an individual Missouri resident, Max House, d/b/a Southside Motors, as a defendant. Relators then moved respondent for an order transferring the case to Phelps County under ' 508.010(3) R.S.Mo. Defendant House never challenged the propriety of venue in Jackson County. In filing their Amended Petition, plaintiffs relied upon the long standing law of Missouri which was reaffirmed by the Missouri Supreme Court in *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994), that venue was fixed at the time a case was brought, meaning the time of original filing. Based on this reliance, plaintiffs believed that they could add the Missouri resident defendant

without affecting the propriety of venue in Jackson County under ' 508.040.

During the pendency of relators' Motion to Transfer, the Missouri Supreme Court remanded a similar case to the trial court in St. Louis City, *State ex rel. Armstrong v. Mason*, No. SC82669 (Nov. 14, 2000). In *Armstrong*, the trial court held that venue was properly determined at the time the case was originally filed and was not affected by the subsequent addition of parties. *See*, Appendix A-10 . Respondent examined *Armstrong* and denied petitioning defendants' Motion to Transfer, determining that venue was fixed at the time the case was originally filed and was proper under ' 508.040. *See*, Appendix A-11.¹

In October, 2001, the Missouri Supreme Court handed down its opinion in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), after which relators once again sought transfer of the case from Jackson County to Phelps County. Plaintiffs responded by arguing that *Linthicum* cannot properly be applied retroactively to the underlying case and by seeking

¹Because of an issue regarding the transfer of the underlying case from respondent to another judge near the time of the original Order denying transfer and the subsequent retransfer of the case back to respondent, respondent reissued the Order denying transfer on October 9, 2001. *See*, Appendix A-14.

leave to revive their original Petition because *Linthicum* substantially changed Missouri venue law.

On February 14, 2002, respondent issued his Order denying Relators' Motion for Reconsideration and granting plaintiffs' Motion to Revive Original Petition. On April 9, 2002, relators filed a Petition for Writ of Prohibition with this Court followed by Suggestions of Respondent and Plaintiffs in Opposition to Defendants' Petition for Writ of Prohibition. This Court issued its Preliminary Writ of Prohibition on April 26, 2002. Respondent filed an Answer to the Preliminary Writ stating the writ should be vacated.

POINTS RELIED ON

1. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING ACTION OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE THE DECISION OF THE MISSOURI SUPREME COURT IN *STATE ex rel. LINTHICUM V. CALVIN* CANNOT BE APPLIED RETROACTIVELY TO THE UNDERLYING CASE.

Prayson v. Kansas City Power and Light Co., 847 S.W.2d 852 (Mo. App. W.D. 1992).

State ex rel. DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo. banc 1991).

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).

Sumners v. Sumners, 701 S.W.2d 720 (Mo. banc 1985).

II. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE REGARDLESS OF ITS PROSPECTIVE VERSUS RETROACTIVE APPLICATION, *LINTHICUM* IS INAPPLICABLE TO THE FACTS OF THE UNDERLYING CASE.

State ex rel. Landstar Ranger, Inc. v. Dean, 62 S.W. 3d 405 (Mo. banc 2001).

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).

State ex rel. Miracle Recreation Equipment Co. v. O=Malley, 62 S.W.3d 407 (Mo. banc 2001).

III. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE VENUE IN JACKSON COUNTY, MISSOURI, WAS PROPER UNDER SECTION 508.040 R.S.MO. AGAINST THE RELATORS, ALL OF WHOM WERE NAMED IN PLAINTIFFS= ORIGINAL PETITION AND REVIVAL OF THAT PETITION REQUIRES DENIAL OF RELATORS= PETITION.

Deister v. Kansas City Northwestern Ry. Co., 195 S.W. 499 (Mo. 1917).

State ex rel. DePaul Health Ctr. V. Mummert, 870 S.W.2d 820 (Mo. banc 1991). *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001).

Welch v. Continental Placement, Inc., 627 S.W.2d 319 (Mo. Ct. App. W.D. 1982).

STANDARD OF REVIEW

Respondent agrees with relators in that when the claim is that the trial court misconstrued or misapplied the law, the appellate court reviews the trial court's decision on a *de novo* basis. *See, e.g.*,

McGhee v. Dickson, 973 S.W.2d 847, 848 (Mo. banc 1998); *Fishman v. Joseph*, 14 S.W.3d 709, 715 (Mo. Ct. App. 2000).

ARGUMENT

FIRST POINT RELIED ON

**RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT
FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING ACTION OTHER THAN**

TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE THE DECISION OF THE MISSOURI SUPREME COURT IN *STATE ex rel. LINTHICUM V. CALVIN* CANNOT BE APPLIED RETROACTIVELY TO THE UNDERLYING CASE.

A. Relators Have Misinterpreted Missouri Law in Arguing that *Linthicum* Should Be Applied Retrospectively.

On February 14, 2002, respondent denied relators' Motion for Reconsideration of Order Denying Defendants' Motion to Transfer for Improper Venue on the basis that the decision of the Missouri Supreme Court in *Linthicum* should not be applied retroactively to the underlying case. *See*, Appendix A-17. Relators challenge respondent's ruling by arguing that "The rules which permit change of venue and transfer of cases thereunder are procedural" and then citing to a number of Missouri cases interpreting the provision under the Missouri Constitution prohibiting the retrospective application of laws. Relators' Brief at 23 and 24. Relators argue that the constitutional prohibition against retrospective application of laws applies only to substantive and not procedural laws. *Id.* Ergo, because venue is procedural, it must be applied retroactively. *Id.*

Relators have completely misinterpreted and misapplied Missouri law on this subject. The provision of the Missouri Constitution in Article I, Section 13 prohibiting *ex post facto* laws has absolutely no application to the issue at bar. It is well settled that the constitutional prohibition is directed only to the legislature and its enactments and no other branch of government. In *Fults v. Board of Probation and Parole*, 857 S.W.2d 388, 390 (Mo. App.W.D. 1993), this Court held that,

The *ex post facto* prohibition concerns laws. That prohibition is directed to the legislature rather than to other branches of government. [Citation omitted]. A law enacted

by a legislature is a law for *ex post facto* purposes.

[Emphasis original] *See also, Tyler v. Mitchell*, 853 S.W.2d 338, 341 (Mo. App.W.D. 1993). Each of the cases cited by petitioning defendants and the cases cited therein, involve *interpretation of the retroactive application of statutes* under the Missouri Constitution, not changes in the law effected by court decision.²

The rule relating to the retroactive application of court decisions, however, is quite different. In *Prayson v. Kansas City Power and Light Co.*, 847 S.W.2d 852, 855 (Mo. App.W.D. 1992), this

²*Mendelsohn v. State Board of Registration*, 3 S.W.3d 783 (Mo. banc 2000), *Corvera Abatement Technologies, Inc. v. Air Conservation Commission*, 973 S.W.2d 851 (Mo. banc 1998), *Beatty v. State Tax Commission*, 912 S.W.2d 492 (Mo. banc 1995), *Doe v. Roman Catholic Dioses of Jefferson City*, 862 S.W.2d 338 (Mo. banc 1993), *Burns v. Laborer & Industrial Relations Commission*, 845 S.W.2d 553 (Mo. banc 1993) and *Wellner v. Diretor of Revenue*, 16 S.W.3d 352 (Mo. Ct. App. W.D. 2000).

Court held that the first exception to the general rule that a change in the law by judicial decision is to be given retroactive effect,

is found when the change pertains to *procedural* as opposed to *substantive* law.@

[Citation omitted]. Such procedural decisions are to be given prospective effect only.

[Emphasis original]. In *State v. Shafer*, 609 S.W.2d 153, 157 (Mo. banc 1980), the Court held that procedural changes in the rules of evidence are given prospective effect only. Further, the Court held that changes A . . . in statutory interpretation operates prospectively so as to not impair the rights, positions, and course of action of parties who have acted in conformity with and in reliance upon the former construction.@

Id.

In effect, therefore, by taking the position that venue is procedural, relators have argued themselves out of their Writ of Prohibition. Application of the appropriate law on the subject requires denial of relators= Petition.

B. Fundamental Fairness Requires that *Linthicum* be Applied Prospectively.

Because plaintiffs believed that the Court's decision in *Linthicum* substantially affected their substantive rights as well, they argued to respondent that the Afundamental fairness@test for retroactive application of court decisions set forth by the Supreme Court in *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. banc 1985), should be applied to the facts of the underlying case. The *Sumners* Court established a three part test for determining when a judicial substantive change in the law would be given prospective versus retrospective application. The Court stated,

In order to clarify the issues regarding the operation of judicial decisions, we adopt a three-factor test to determine whether an overruling decision of this Court should be given prospective-only effect. First, the decision in question must establish a new principle of law . . . by overruling clear past precedent . . . @*Chevron Oil Company v. Huson*, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed. 2d 296 (1971). Second, the Court must determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation. See, *Linkletter*, *supra*, 381 U.S. at 629, 85 S.Ct. at 1737. Third, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule.

Id. at 724. Application of these factors to the underlying case favors prospective, not retrospective application of the *Linthicum* holding. First, the *Linthicum* holding clearly establishes a new principle of law for determining proper venue which overrules clear past precedent. Second, the stated purpose of the *Linthicum* decision is to afford *subsequently added Missouri resident* defendants an opportunity to challenge venue, thereby protecting the interests of those defendants. The *Linthicum* Court expressed concern that reliance on the statement in *State ex rel. DePaul Health Ctr. v. Mummert*, that venue is determined as the

case stands when brought@, would be unfair to a subsequently added Missouri resident defendant because,

Under this interpretation, a plaintiff could sue a *Missouri resident* in any of over one hundred venues by simply suing a non-resident under section 508.010(4), and then amending the original petition to include the Missouri resident.

57 S.W.3d at 857. [Emphasis added].

The Court further stated that,

The circuit court's analysis of the word "brought@" assumed a temporal distinction that conferred different venue rights on *Missouri defendants* depending on whether the plaintiff initially named or subsequently added them to the lawsuit.

Id. at 858. [Emphasis added].

By contrast, in the underlying case, the subsequently added Missouri resident defendant, Max House, d/b/a Southside Motors has never challenged venue in Jackson County, Missouri.

Nor can House now properly challenge venue because he failed to challenge venue at the earliest possible opportunity. In *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445, 446 (Mo. banc 1997), the Court held that the issue of "improper venue is waived if it is neither made by motion under Rule 55.27 nor included in a responsive pleading." The Court further held that, "Rule 55.27(a) requires a party to 'assert' the defense of improper venue . . . requiring a positive, assured, plain, or strong affirmation." *Id.* Moreover, "A . . . the rule requires a

defendant to assert improper venue at the earliest opportunity in order to avoid unnecessary delay and expense.@ ***Id.*** In the underlying case, defendant House did not raise the defense of improper venue either in his Answer, Appendix A-20, or in any motion.

The only challenges have come from the petitioning corporate defendants, who were named in the original Petition. Because the clear purpose of the ***Linthicum*** decision is to afford subsequently added resident defendants an opportunity to challenge venue, that purpose is not in any way enhanced by allowing the originally named foreign corporate defendants to challenge venue, particularly when venue was proper as to them to begin with.

Third, because plaintiffs relied on the old rule of law regarding determination of venue as discussed *supra* and because of the expiration of the statute of limitations and plaintiffs' prior use of the saving statute as referenced in petitioning defendants' suggestions, retroactive application of the ***Linthicum*** opinion in the underlying case would result in great prejudice to plaintiffs and deprive them of two important rights long recognized by Missouri law.³ The first

³Relators argue that plaintiffs could not have relied on the ***State ex rel. Armstrong v. Mason*** case referred to in respondent's Order. While the ***Armstrong*** case was at issue in the first of relators' motions for reconsideration and respondent's Order refers to that case, it was the well established rule reaffirmed by the Supreme Court in ***State ex rel. DePaul Health Ctr. v. Mummert***, that plaintiffs relied upon in filing their original Petition and amending that Petition in December, 1999. Plaintiffs in the underlying action clearly stated that reliance at pages 6 and 7 of their Suggestions in Opposition to Defendants' Motion for Reconsideration

involves the weight given to a plaintiff's choice of forum. In *Anglim v. Missouri Pac. R. Co.*, 832 S.W.2d 298, 302 (Mo. banc 1992), the Court held that **A**. . . a plaintiff's choice of forum is not to be disturbed except for "weighty reasons". . . .²⁰ The second is plaintiff's right to choose the party or parties from whom they seek recovery. In *Missouri Pac. R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 474 (Mo. banc 1978), the Missouri Supreme Court held that,

. . . the ability of a plaintiff to sue and ultimately collect judgment against his or her choice of tortfeasor need not be impaired. Plaintiff continues free to sue one or more concurrent tortfeasors as he sees fit

See also, Magnuson v. Kelsey-Hayes Co., 844 S.W.2d 448, 452 (Mo. App.W.D. 1992).

(**A**[plaintiff] has the right to pursue and collect from any tortfeasor of his choosing²¹) To the contrary, no hardship is imposed on the relators because they are simply subject to suit in the same venue they were when the case was originally filed.

or Order Denying Defendants' Motion to Transfer for Improper Venue, Appendix A-26, which gave rise to respondent's Order that is challenged by petitioning defendants here. The decision in *Armstrong* did, however, give further support to plaintiff's reliance on *DePaul*.

Relators=argument that subsequent decisions of the Missouri Supreme Court applying *Linthicum* to pending cases mandates its retroactive application, is without merit. Relators cite to *State ex rel. Miracle Recreation Equipment Co. v. O'Malley*, 62 S.W.3d 407 (Mo. banc 2001), and *State ex rel. Landstar Ranger, Inc. v. Dean*, 62 S.W.3d 405 (Mo. banc 2001), both of which were decided after *Linthicum*. In each instance, the Supreme Court remanded the case to the trial court to determine venue in accord with *Linthicum*,⁴ but did not order the trial court to transfer the case for improper venue.⁴ *Id.* Moreover, in both cases,

⁴In the *Miracle Recreation* case, venue was ultimately transferred by respondent herein, but the motion for transfer was unopposed as noted by the Order of Transfer. Obviously, the issue of transfer in the underlying case here is opposed. The copy of the order is unsigned, because it was the only copy respondent had available due to the transfer of the case, but it truly and accurately reflects that the Motion to Transfer was unopposed. *See*, Appendix A-46.

unlike the underlying case, it was the subsequently added Missouri resident defendants who challenged venue. *Id.* It is well settled that the court has,

. . . the authority to declare whether such decisions are retroactive or prospective based on the merits of each individual case.@[Citations omitted].

Prayson v. Kansas City Power and Light Co., *supra*, 847 S.W.2d at 855. Because the circumstances of the *Miracle Recreation* and *Landstar Ranger* cases are substantially different from this case as they relate to the clearly stated purpose of the *Linthicum* decision, a case-by-case analysis favors respondent's refusal to apply *Linthicum* to the facts of the underlying case.

The *Sumners* Court held that the question of whether a substantive judicial decision is applied prospectively or retroactively is one of fundamental fairness.@ 701 S.W.2d at 723. Respondent properly concluded that it would be unfair to apply *Linthicum* retroactively the facts of the underlying case when *Linthicum* changed longstanding law upon which plaintiffs relied and the defendants who were moving for transfer were not the parties *Linthicum* sought to protect, nor would they be prejudiced by maintaining the case in Jackson County.

C. Relators' Forum Shopping Argument is Flawed and Does Not Support Retrospective Application of *Linthicum*.

Finally, relators argue that *Linthicum* should be applied retroactively to prevent plaintiffs from forum shopping. To the contrary, it is relators who are doing the forum shopping here. By attempting to take advantage of a judicial decision that was never intended

to protect them, relators are merely trying to secure the advantage of transferring this case from a county in which two of them kept an office or agent for the transaction of their usual and customary business to a rural county that they believe is more favorable to their interests.

SECOND POINT RELIED ON

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE REGARDLESS OF ITS PROSPECTIVE VERSUS RETROACTIVE APPLICATION, *LINTHICUM* IS INAPPLICABLE TO THE FACTS OF THE UNDERLYING CASE.

As stated above, the *Linthicum* decision was the product of the Missouri Supreme Court's interest in protecting the right of subsequently added resident defendants to challenge venue. A common denominator in the *Linthicum*, *Miracle Recreation*, and *Landstar* cases is that in each instance the subsequently added resident defendant challenged venue. This fact substantially distinguishes those cases from the underlying case because the subsequently added resident defendant, Max House, d/b/a Southside Motors has not and cannot now challenge venue in Jackson County. See, First Point Relied On, Section B, *supra*. Therefore, the protections afforded by *Linthicum* are inapplicable to the underlying case.

THIRD POINT RELIED ON

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE VENUE IN JACKSON COUNTY, MISSOURI, WAS PROPER UNDER SECTION 508.040 R.S.MO. AGAINST THE RELATORS, ALL OF WHOM WERE NAMED IN PLAINTIFFS= ORIGINAL PETITION AND REVIVAL OF THAT PETITION REQUIRES DENIAL OF RELATORS= PETITION.

On February 14, 2002, respondent also granted plaintiffs= Motion for Leave to Revive Original Petition, effectively placing the case back in the posture it was when originally filed. *See*, Appendix A-48. Petitioning defendants challenge the propriety of this Order only on the basis that the filing of an amended petition renders the original petition *abandoned*. Of course, that is the reason plaintiffs sought to revive the original Petition. Petitioning defendants have not cited any authority to suggest that revival of the original petition is improper. To the contrary, there are Missouri cases that refer favorably to the revival of petitions and claims. *See, e.g., In Re: Franz= Estate*, 372 S.W.2d 885, 905 (Mo. 1963), *Deister v. Kansas City Northwestern Ry. Co.*, 195 S.W.499 (Mo. 1917); *Welch v. Continental Placement, Inc.*, 627 S.W.2d 319 (Mo. Ct. App. W.D. 1982).

The propriety of respondents= order allowing plaintiffs to revive their original Petition

is also a question of fundamental fairness. In relying on the long standing law of Missouri that venue is fixed at the time a case is originally brought, plaintiffs would be substantially prejudiced by the change of that law in ***Linthicum*** if relators' motion was granted. *See*, First Point Relied On, Section B, *supra*.

By contrast, relators are not prejudiced at all by the revival of plaintiffs' original Petition. The allegations against relators in the original Petition are precisely the same as the allegations against them in the Amended Petition. Moreover, relators are only being subjected to the venue that was unquestionably proper as to them under ' 508.040 R.S.Mo. to begin with. Even Judge Limbaugh, who participated in the four judge majority in ***Linthicum***, recognized that the original defendants in a case are not prejudiced. In his dissent in ***State ex rel. DePaul Health Ctr. v. Mummert***, 870 S.W.2d 820, 823 (Mo. banc 1994), Judge Limbaugh stated that there would be A . . . no harm to the remaining defendants who would be subject to the same venue had plaintiff originally filed the suit without joining the party who defeated venue.@

Relators have made no arguments, nor cited any authority, that would give this Court a basis for questioning, much less reversing, respondent's Order Reviving Plaintiffs' Original Petition. Because venue in Jackson County, Missouri, is unquestionably proper against relators in the revived original Petition under ' 508.040 R.S.Mo., the Preliminary Writ of Prohibition should be vacated.

CONCLUSION

Relators have delayed this case for almost two and a half years in their repeated attempts to transfer it to the venue of their choice, Phelps County. Respondent's Order is soundly based on Missouri law as applied to the facts of the underlying case. For these reasons, respondent and plaintiffs respectfully pray an Order of this Court remanding the case to respondent for further proceedings in Jackson County, Missouri.

Respectfully submitted,

The Honorable John R. O'Malley
Circuit Court of Jackson County, Missouri
415 E. 12th Street
Kansas City, MO 64106
RESPONDENT

Stephen M. Glassman
Attorney at Law
130 S. Bemiston Ave., Suite 700
St. Louis, MO 63105
T: 314/863-4654
F: 314/862-4357

RISJORD & JAMES, P.C.
218 NE Tudor Road
Lee's Summit, MO 64086
T: 816/554-1500
F: 816/554-1616

By: _____
Randy W. James #30624
Lauren E. Perkins #49845
ATTORNEYS FOR RESPONDENT
AND PLAINTIFFS DEWEY
AND CONNIE JOHNSON

CERTIFICATE REQUIRED BY RULE NO. 84.06(c)

The undersigned does hereby certify that this Brief complies with Rule 84.06(c) and contains 4557 words. The undersigned further certifies that a floppy disk containing Respondent's Brief was filed with this Brief in compliance with Rule 84.06(g) and that the disk is virus free.

RISJORD & JAMES, P.C.
218 NE Tudor Road
Lees Summit, MO 64086
T: 816/554-1500
F: 816/554-1616

By: _____
Randy W. James #30624
Lauren E. Perkins #49845

ATTORNEYS FOR RESPONDENT
AND PLAINTIFFS DEWEY
AND CONNIE JOHNSON

CERTIFICATE OF SERVICE

The undersigned does hereby certify, pursuant to Rule 84.06(g) that (1) two hard copies of the foregoing document in the form specified by Rule 84.06(a) and (2) a copy of the disk required by Rule 84.06(g) was sent via United States Mail, postage prepaid, on this 25th day of June, 2002, to the individuals below. The undersigned does also hereby certify that the disk required by Rule 84.06(g) is virus-free.

Paul A. Williams
Robert T. Adams
Julie A. Shull
Shook, Hardy & Bacon L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

Horn Aylward & Bandy, LLC
2600 Grand Boulevard, Suite 500
Kansas City, MO 64108

Attorney for Relator
Cooper Tire & Rubber Co.

Attorneys for Relator
Ford Motor Company

Thomas P. Schult
John W. Shaw
Kathleen M. Nemecheck
Berkowitz, Feldmiller, Stanton, Brandt,
Williams & Shaw LLP
Two Emanuel Cleaver II Boulevard
Suite 500
Kansas City, MO 64112-1736

Attorneys for Relator
The Budd Company

Robert A. Horn